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In The
Supreme Court of the United States

October Term 1995

CHRISTINE SOLEM,

Petitioner,

v.

J. CARLTON COURTER, III, Commissioner of Agriculture and Consumer Services,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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24pp

QUESTIONS PRESENTED

No. 1 Whether the Fourth Circuit is in conflict with Migra v. Warren City School District Board of Education, 465 U.S. 75(1984), with the respect to the Constitution's Full Faith and Credit Clause, thus denying a litigant the opportunity to present his federal claim in federal court, when in fact he would not be prevented from presenting his federal claim in state court under that particular state's claim preclusion law.

Virginia has adopted Regulations Governing Grade A Milk, based on the Grade A Pasteurized Milk Ordinance--1989 Recommendations of the United States Public Health Service/Food and Drug Administration, the purpose of which is to "encourage a greater uniformity and a higher level of excellence of milk sanitation practice in the United States", and, "to facilitate the shipment and acceptance of milk... of high sanitary quality in interstate and intrastate commerce." The language of this ordinance, employed by the Virginia regulations in regulation No. VII, states in pertinent part, "a person may sell..only grade A pasteurized milk to the final consumer." The State has applied regulation VII to prohibit incidental, on-farm sales of a farmer's excess ungraded raw goats' milk to friends and neighbors, who unsolicited, approach the farmer to purchase the milk for their own consumption. Thus, the further questions presented are:

No. 2 Whether the police power of the State to regulate should extend to a total prohibition of the above described sales, or is this an unreasonable violation of liberty of contract and personal property rights protected by the Fourteenth Amendment Due Process Clause.

No. 3 Whether the small diversified farmer, dependent on the sum of all such incidental sales of agricultural products, has unreasonably been denied his right to make a living from his land under the same Fourteenth Amendment Clause above.

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IN THE SUPREME COURT OF THE UNITED STATES
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CHRISTINE SOLEM,
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COMMISSIONER OF AGRICULTURE
AND CONSUMER SERVICES
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Christine Solem respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is unreported and is reproduced in an appendix to this brief on page 1-3. (hereinafter cited "App., p. ___") The opinion of the district court is also unreported and is reproduced at App., p. 4-13.

JURISDICTION

The court of appeals entered its judgment on August 18, 1995 (App., p.1). A petition for rehearing and suggestion for rehearing in banc were denied September 25, 1995 (App., p. 15). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY, CONSTITUTIONAL, AND REGULATORY PROVISIONS INVOLVED

1. The Full Faith and Credit Clause of the United States Constitution, Art. IV § 1 is implemented by the federal full faith and credit statue, 28 U.S.C. § 1738 and reads in pertinent part:

> "such Acts, records, and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

2. The relevant portion of the Fourteenth Amendment Section 1 to the Constitution of the United States is: "..nor shall any State deprive any person of life, liberty, or property, without due process of law..."

3. The specific portion of Virginia's Regulations Governing Grade A Milk, applied to prohibit Petitioner from selling ungraded raw goats' milk from her farm under the circumstances outlined in this petition is:

> ":..a person may sell in, offer for sale in, or expose for sale in the Commonwealth only grade A pasteurized, ultra-pasteurized, or aseptically processed milk or milk products to the final consumer, or to restaurants, soda fountains and grocery stores..." (App., p. 102)

The entire Regulations Governing Grade A Milk are reproduced in the Appendix as well, as each provision therein must be complied with, or Petitioner may not sell goats' milk,

pasteurized or otherwise, under the circumstances outlined in this petition.

STATEMENT

A. Proceedings Below

Petitioner, Christine Solem, filed a complaint for declaratory relief in federal district court for the western district of Virginia, August, 1994 against J. Carlton Courter, III, Commissioner of Agriculture and Consumer Services, State of Virginia, alleging that regulation VII of Virginia's Regulations Governing Grade A Milk is unconstitutional as applied to prohibit certain incidental, on-farm sales of ungraded raw goats' milk. Jurisdiction for the federal court arose under the Fourteenth Amendment, Section 1, of the U.S. Constitution and U.S.C., Title 28 § 1331, as the complaint alleged that since the type of sales involved were not substantially related to the public health, that their absolute prohibition was an unreasonable violation of liberty of contract and personal property rights protected under the Fourteenth Amendment Section 1 (Due Process Clause). The complaint also alleged, under the same Constitutional Amendment, that Solem was being denied the use of her land to sustain herself and make a living, and that the wording of regulation VII was unconstitutional when applied to said sales. (App., p. 119-121)[1]*

Defendant, Courter, filed a motion to dismiss/summary judgment, raising the affirmative defense of res judicata and claiming that the court lacked jurisdiction over the subject matter. The magistrate judge granted the Defendant's motion as a matter of law in a pretrial hearing, December, 1994, agreeing with all the State's contentions with regards to

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* Petitioner includes the complaint (minus the exhibit) in this Appendix, as the nature of the complaint has not been portrayed correctly in the lower court opinions.

Solem's claim, and specifically citing the case of Migra v. Warren City School District Board of Education, 465 U.S. 75, in ruling on the Defendant's res judicata defense. (specifically, App. p. 7).

Solem appealed to the Fourth Circuit Court of Appeals claiming, inter alia, that;

> 1. The lower court had confused the two preclusion concepts--claim preclusion and issue preclusion--under res judicata, which resulted in the application of an erroneous legal standard to the facts, and a failure to apply Virginia's claim preclusion law as required by Migra.
>
> 2. The case should not have been dismissed on a pretrial motion to dismiss/summary judgment as there were unresolved questions of mixed law and fact arising from the manner in which the complaint was drawn, most notably:
>
> a. Whether the unsolicited, incidental, on-farm sale described in the complaint constitutes a sale to the "public".
>
> b. Whether it is unreasonable to apply regulations designed for commercial enterprises to home farm products sold in such a manner so as to be categorized an agricultural pursuit.
>
> c. Whether it is unreasonable to absolutely prohibit the sale of ungraded raw goats' milk under the circumstances outlined in the complaint when it is perfectly legal to give it away. (Solem's formal brief to the Fourth Circuit, p. 24-28).

Without addressing any other issues, and without reviewing or analyzing Virginia's law of claim preclusion, the Fourth Circuit affirmed the judgment below on the basis of Migra, supra., stating that Solem had had ample opportunity to litigate her claim in state court proceedings; however, the

opinion did not purport to apply state (Virginia) claim preclusion law as required by Migra.

Solem petitioned for a rehearing and suggested a rehearing in banc, citing a conflict between the Fourth Circuit's application of Migra in Solem v. Courter and Jones v. Poindexter, 903 Fd 2d 1006 (4th Cir, 1990). In the Jones case, supra., at 1010, the Fourth Circuit took special note of Virginia's claim preclusion law, defining Virginia's definition of "claim" as, 'When the same evidence is necessary to prove two claims, both claims are part of the same cause of action;' Brown v. Haley, 233 Va. 210, 355 S.E. 2d 563, 567 (1987). 'The barring of a cause of action which could have been litigated is...directed...to a claim which, if tried separately, would constitute claim-splitting.' Bates v. Devers, 214 Va. 667, 202 S.E. 2d 917, 920-21 (1974).

Solem pointed out that her federal claim constituted a different cause of action from either of her two previous cases (see history of case infra.) as evidence from neither of the two cases would support her current federal claim. The petition for rehearing and suggestion for rehearing in banc were denied without comment.

B. History of the Case

For twenty-two years, in Albemarle County, Virginia, Petitioner has owned a ten acre farm which produces market vegetables, and upon which she keeps roughly 12 dairy goats for milk, cheese, butter, meat and fertilizer, and 10 chickens for eggs, meat, and fertilizer. The farm provides food for the Petitioner and a partial living from the land.

From 1975-1979 Petitioner sold milk at the Blue Mountain Health Food Store in Charlottesville, Va., marking it "not for human consumption", as an individual in the health department had told her that raw milk could not be sold in Virginia for human consumption, and Petitioner thought that if it was marked in this manner that that would be legal. (App.

from Carbaugh v. Solem, 225 Va. 310, 302 S.E. 2d 33(1983), filed as part of the record in the district court, p. 77, 170.)

In November of 1979 Petitioner/Solem was ordered to stop the sales by an inspector with the Virginia Department of Agriculture and Consumer Services. Solem began renting her goats at the farm so that people might legally have the milk, as there were several people who needed the milk, including a baby allergic to cow and soy milk. (App. of Carbaugh v. Solem, Id, p. 102-105)

In July of 1980 the Department of Agriculture and Consumer Services and the Health Department, State of Virginia, filed an injunctive proceeding against Solem in the Albemarle Circuit Court, charging her with selling milk in violation of Regulation X of the Rules and Regulations Governing the Production, Processing and Sale of Grade A Pasteurized Market Milk and Grade A Pasteurized Market Milk Products and Certain Milk Products. Solem claimed in her defense that she was renting the goats, which did not constitute a sale of milk. Evidence presented included goat leasing papers, and testimony from persons leasing the goats. (App. from Carbaugh v. Solem, supra., p. 100-123, 163) But the judge refused the request for an injunction, ruling that Solem had not placed the milk in commerce and that he was unwilling to say that a customer should be protected from himself when he knew what he was getting and was asking for it. There was no ruling as to whether or not the renting of goats was a sale of milk. (Joint Appendix, filed in Solem v. Courter in the Fourth Circuit, p. 90-93)

The State appealed to the Virginia Supreme Court and in the case reported as Carbaugh v. Solem, Id. Solem's leasing program was determined to be a sale; a single sale, no matter how limited or restricted, was determined to be unlawful, and an injunction was mandated and signed. (Joint App., Solem v. Courter, p. 11)

Since the State had acknowledged that raw goats' milk could be given away, (Joint App., Solem v. Courter, p. 50)

Solem then gave the milk away to people who came to the farm and wanted it. But this practice was unworkable as the people insisted on paying and began devising strategies to achieve their goal, and Solem was under injunction and at risk. (Joint App., Solem v. Courter, p. 56) She therefore filed a declaratory action against the same two above parties, which was tried in 1986, asking the Albemarle Court to declare the legality of selling shares in a goat, so that a person could have the milk, the theory being that if the person owned the goat, he owned the milk, thus no sale, and Solem would not be in violation of the regulations. Evidence presented included bills of sale to prove that persons had purchased the shares. (App. of Kenley v. Solem, 237 Va. 202, 375 S.E. 2d 532 (1989) filed in district court as part of the record)

Once again Solem prevailed in the state trial court with the judge ruling that the selling of shares in the goats was not a sale, since title to the animal had passed and the owner was entitled to a portion of the milk. The State again appealed to the Virginia Supreme Court and the victory was overturned, the court acknowledging the formal transfer of the interests in the goats, but finding flaws in the handling of the milk and the dealings with the customers that made the distribution of the milk essentially a sale. (Kenley v. Solem, Id.)

In 1993 Regulations Governing Grade A Milk was adopted, superseding the Rules and Regulations Governing the Production, Processing and Sale, etc. . The parties are in dispute as to whether Solem is still subject to the 1983 injunction based on the prior regulation. (Joint App., Solem v. Courter, pp. 3, 6, 7, 9, 20, 60, 61, 88, 89)

The current federal suit has been filed as Regulations Governing Grade A Milk, irregardless of the validity of the injunction, still prohibit Petitioner from selling ungraded raw goats' milk for human consumption under the circumstances outlined in her complaint.

Reasons for Granting the Petition

The decision below on res judicata is erroneous and thus prevents a hearing on the merits of Petitioner's substantive claim. Petitioner's substantive claim is an important one to be addressed by this Court as it concerns incidental sales, their necessity to the life of small diversified farms anywhere in this country, and whether the regulatory power of the State has the authority, under the United States Constitution, to snuff out that life. The Pasteurized Milk Ordinance is a federal law adopted by all fifty states, but applied in a conflicting manner from state to state with regards to incidental, on-farm sales. The interpretation of this law should be clarified by the Court so that it is not misused in an unconstitutional manner. Virginia has applied this ordinance in a manner which has led to oppressive and absurd consequences. Under the state's application, it is illegal even for a farmer to sell a quart of his own raw goat's milk to his own mother or father.

I. The Decision of the Fourth Circuit Concerning Res Judicata is Erroneous, in Conflict with the Constitution's Full Faith and Credit Clause, The Supreme Court, All other Circuits, and Itself

A. The Fourth Circuit Erroneously Applied the Rule That Any Claim That Could Have Been Presented in Earlier State Litigation is Barred from Assertion in a Subsequent Federal Case.

The merits of Petitioner's substantive claim were not reached by the Fourth Circuit as the court affirmed the opinion of the district court, stating that Solem is precluded from raising her Fourteenth Amendment due process claim in

Federal Court under Migra v. Warren City School District Board of Education, 465 U.S. 75(1984).

Above all, the Migra case, supra. was an affirmation of the Constitution's Full Faith and Credit Clause.

> "It is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered."

Migra, supra., at 81(emphasis added) As such, the Migra case, supra. was a culminating decision, resolving conflicts in the circuits below as to whether or not claim preclusion was applicable to a §1983 litigant who could have raised a federal claim in earlier state court proceedings, but did not. (Migra, supra., at 83)

After the Migra decision, the circuits fell in line, citing the precedent; the conflict was resolved. State rules of claim preclusion must apply. There occurred a total of over 300 cases under Migra in the various Circuit Courts of Appeals, all applying, as Migra instructed, the state preclusion law of the particular state in question. The Fourth Circuit itself had fourteen such cases under Migra, in which either South Carolina, North Carolina, Maryland or Virginia claim preclusion law was respectively analyzed and applied.

It is clear, however, that in the instant case that neither the federal district court nor the Fourth Circuit on appeal considered Virginia's claim preclusion law in Solem v. Courter. Not only is there not a single Virginia case cited in these opinions, but also the language of the Fourth Circuit expressly adopts a standard unrelated to (and in fact contrary to) the State law rule. The Fourth Circuit opinion states,

> "Because it is more important to give full faith and credit to state court judgments than ensure separate forums for federal and state claims, Solem is precluded from raising claims that she had ample opportunity to litigate in her state court proceedings."

But, the question does not turn on whether Solem had ample opportunity to litigate her claim in state court proceedings; rather the question turns on whether, under Virginia claim preclusion law, she was required to take that opportunity to raise her claim, or be barred.

To construe Migra as simply prohibiting under the rubric of "claim preclusion" a federal claim to be raised in federal court when it could have been raised in previous state court proceedings without analyzing the applicable state's claim preclusion law is directly in conflict with Migra. This is a serious error, neither technical nor harmless, as Petitioner is being denied her opportunity to litigate her federal claim. This case thus raises an important federal question, as the application, or lack thereof, of the Constitution's Full Faith and Credit Clause is intrinsic to the denial.

The error is particularly unjust when viewed in light of the fact that the very principle affirmed in Migra. establishing a uniform rule as to preclusion of a federal claim in federal court following state court proceedings, has now been abandoned under the cover of Migra. So that fairness, consistency, and confidence in the legal system may be maintained, the Supreme Court should grant this petition so that this error does not stand.

B. Petitioner's Claim Should Not Be Precluded in Federal Court as It Would Not Be Precluded in State Court

It is of note that Virginia claim preclusion law has already been analyzed by the Supreme Court in Haring v. Prosise, 462 U.S. 306 (1983). A footnote at 315 states:

> "..the courts of Virginia apply different rules of preclusion to matters arising in a suit between the same parties and based upon the same causes of action as those involved in the previous proceeding. Under the doctrine of res judicata, 'the judgment in the former (action) is conclusive of the latter, not only as to every question which was decided, but also as to every other matter which the parties might have litigated and had determined, within the issues as they were made or tendered by the pleadings, or as incident to or essentially connected with the subject matter of the litigation, whether the same, as a matter of fact, were or were not considered.' ...THIS DOCTRINE DOES NOT APPLY, HOWEVER, ...TO A LATER ACTION BETWEEN THE SAME PARTIES ON A DIFFERENT CLAIM OR DEMAND..." (Emphasis is Petitioner's, citations omitted)

Haring v. Prosise, supra. does not address exactly what Virginia law defines as a cause of action/claim. However this definition is made clear by the Fourth Circuit in Jones v. Poindexter, 903 F 2d 1006, supra. Jones uses two Virginia cases to lock in the definition at 1010:

> No. 1. Brown v. Haley, 233 Va. 210, 355 S.E.2d 563,567(1987) states that where the same evidence is necessary to prove two

claims, both claims are part of the same cause of action.

Since Petitioner/Solem's current constitutional claim is not resting on goat leasing papers or bills of sale proving ownership of shares in a goat, under Virginia law, it is a different cause of action. (See statement, History of the Case, supra. to corroborate this statement and those immediately below)

No. 2. Bates v. Devers, 214 Va. 667, 202 S.E. 2d 917, 920-21(1974) states,

"The barring of a cause of action which could have been litigated is...directed...to a claim which, if tried separately, would constitute claim-splitting."

The Jones v. Poindexter case supra., was specifically pointed out by the Petitioner as conflicting in reference to her own case. (See Statement, Proceedings Below, supra.) The Fourth Circuit had already construed the Virginia claim preclusion rule in the Jones case supra. in such a way as to make clear that it would not apply in the circumstances of Petitioner's case. In Jones, the Court correctly found the Virginia law to be that a claim would be precluded in later litigation only if it were the same claim, in the sense that it relied on the same evidence as earlier asserted so that it would violate the rule against splitting a single cause of action.

The Court below violated the federal mandate of Migra by applying a completely different (and presumably federal rule), namely, that a claim is precluded if the litigant had the opportunity of raising it in earlier litigation even if such a claim would not be barred by State court. Here the Constitutional claims were not raised in earlier litigation, but do not rely on the same evidence (leases, shares, testimony of

lessees) and are therefore not barred as being the same cause of action earlier litigated.

With regards to the above it must be stressed that a cross-bill (Virginia still has separate rules for law and equity) is not mandatory in Virginia. Rule 2:13 of the Rules of the Supreme Court of Virginia states, "A defendant may (Petitioner's emphasis) file a cross-bill which seeks relief against the plaintiff." Therefore, Petitioner/Solem was not required to raise her current constitutional claim when she was a defendant in Carbaugh v. Solem, 225 Va. 310 supra., a case brought in equity against her.

As for Solem's second litigation in which she was initially a plaintiff, Kenley v. Solem, 237 Va. 202, supra., the case was a declaratory action, involving no Constitutional issues, and thus it too presents no claim preclusion bar to the instant case. Virginia law, as exemplified in Winborne v. Doyle, 190 Va. 867, 59 S.E. 2d 90(1950), on declaratory judgments and claim preclusion, is the same as presented in Restatement, Second, Judgments, §33c (1980), "..a declaratory action determines only what it actually decides and does not have a claim preclusive effect on other contentions that might have been advanced." Kenley v. Solem ultimately decided only the narrow issue that the selling of shares in a goat so as to provide persons with the milk constituted a sale in violation of the regulations.

It is thus clear that Petitioner/Solem's current Constitutional claim is not barred in federal court as it would not be barred in state court because the claim fits the definition of a different cause of action under Virginia law, and is thus not precluded under Virginia claim preclusion law, either in and of itself, or even if considered a claim which would have been joined in a previous proceeding.

Accordingly, since Virginia law is clear and not evolving with regards to its claim preclusion law, since all facts brought up by the Petitioner in this regard are undisputed and may be observed in the record, and since the decision

below is clearly in error and in conflict with past decisions of this Court, the Court may wish to consider summary reversal of the decision below affirming dismissal of Petitioner's claim on the basis of Migra.

II. The Pasteurized Milk Ordinance has Identical or Similar Counterparts in All 50 States, and Its Language Concerning Sales of Milk to the Final Consumer is Applied in a Conflicting Manner From State to State With Regards to Incidental, On-Farm Sales

On May 10, 1987 the Food and Drug Administration/Health and Human Services prohibited the interstate sale of unpasteurized milk for human consumption, 21 C.F.R. §1240.61. The practical result of this is that every state wishing to ship milk beyond its borders has adopted the Pasteurized Milk Ordinance, or a similar counterpart. (See App., p. 125)

Though all states have adopted some form of this same federal law, approximately 50% do not apply the prohibition contained therein that only Grade A pasteurized milk may be sold to the final consumer to prohibit intrastate sales of raw milk, as they have various other regulations in this regard that allow the sales. Twelve states have no regulation at all, or very little for incidental, on-farm sales, whether solicited or not; although most all incidental, on-farm sales are unsolicited. (See App., p.126 for information on raw milk states) Thus the application of the federal Pasteurized Milk Ordinance varies from state to state with respect to incidental, on-farm sales. (See App., p. 114-116,122-124 for correspondence which illustrates this point)

Of particular note is the State of Michigan which adopted the Pasteurized Milk Ordinance in 1966,(App., p.123) and is now applying it to prohibit incidental, on-farm sales in spite of the fact that People v. Powell, 280 Mich 699, 274

N.W. 372, 111 A.L.R. 721(1937) is controlling law in that state as to the licensing of incidental, on-farm sales of milk. That case held that such sales were not a sale to the "public" under the statute in force at that time, and that, "The statute was not intended to abridge the right to contract with a few neighbors for a strictly incidental purpose," or... "to be so construed as to compel every farmer who sells a pint of milk to his neighbor to take out a license and be placed under public regulation." People v. Powell, 280 Mich., at 73. (Joint App., Courter v. Solem, filed in Fourth Circuit, p 65-73) (See same App. for beginning arguments on this subject, p.113-114) Although the wording of the statute at that time is not the same as the Pasteurized Milk Ordinance, the adjudged principle of law endures.

In this regard the Michigan Supreme Court decision in People v. Powell, supra. is in conflict with the Virginia Supreme Court decision in Carbaugh v. Solem, 225 Va. supra. at 310, which states, "Such sales are commerce, and all such commerce, no matter how 'limited' or 'restricted', is unlawful. A single sale is both a civil violation and a criminal offense."

The fact that various states are applying the prohibitory language of the Pasteurized Milk Ordinance to prevent incidental, on-farm sales is of concern as such sales touch close to the heart of liberty under the Constitution's Due Process Clause. Since this ordinance is a federal law it should be applied in a manner which is both consistent and constitutional.

Under §14, Interpretation and enforcement, of Virginia's Regulations Governing Grade A Milk it states,

> "A. This regulation is based on the 'Grade A Pasteurized Milk Ordinance--1989 Recommendations.' Except as otherwise provided in this regulation, the provisions of this regulation shall be interpreted in a manner consistent with interpretations accorded the

'Grade A Pasteurized Milk Ordinance--1989 recommendations'." (App., p. 108)

The Introduction to the Pasteurized Milk Ordinance--1989 Recommendations states that its adoption is recommended, "to encourage a greater uniformity and a higher level of excellence of milk sanitation practice in the United States "...and, "to facilitate the shipment and acceptance of milk and milk products of high sanitary quality in interstate and intrastate commerce."

Whether this "purpose" is interpreted to cover incidental, on-farm sales under the circumstances outlined in Petitioner's complaint is not at all apparent in the ordinance itself; in fact definitions of "dairy farm", "milk producer", "consumer", etc., do not support such an interpretation of its purpose. (App., p. 23, 30, 22) It is hoped that the Supreme Court will grant this petition so that the merits of this case can be argued, not only on the above points, but others as well. The Pasteurized Milk Ordinance is used throughout this country, and its interpretation needs to be clarified by this Court so that it is not misused in an unconstitutional manner.

III. Incidental, On-Farm Sales Are Crucial to the Continued Existence of Small Farms Across the Country

The sum total of all incidental, on-farm sales of various farm products comprises a small diversified farm's profitability, and in fact the sales are interdependent with each other; yet no category of any such incidental sale is large enough to be "clothed with a public interest". As such, this case concerning goats' milk could just as well have been about meat, homemade cheese, or any other farm product sold in an analogous manner. This type of farm, once the backbone of our country, right now is struggling in America, as regulations

designed for commercial agribusiness enterprises are applied to it in an increasing number of states.

This application is paralleled by the growth of agribusiness in that particular state. While agribusiness serves an important function, small diversified farms also serve other equally important functions. Small farmers buy bags of feed at the co-op stores too, thus supporting the infrastructure of the whole agricultural community. Then too, these small farms provide persons who cannot afford the capital expenditure required to set up a commercial agribusiness operation the opportunity to make a living. When small farms fail, so does the overall rural economy and culture.

As agribusiness interests become more powerful in a state, greed and short-sightedness on their part exert a powerful influence on the wisdom and intent of a state legislature that can trample the rights of due process and contract of small domestic farms. This phenomena is illustrated by the attempts made in 1992-94 in the Virginia legislature to allow the unadvertised, on-farm sale of up to 100 gallons a month of ungraded raw goats' milk. (Joint App., Solem v. Courter. Fourth Circuit, p. 17, 97) Other conditions imposed on the sale were simple testing, warning labels, etc.; that is to say, reasonable regulations designed to balance the issues of health protection and freedom. The failed bill is in the Appendix, p. 117-118, Raw goats' milk is food, legal to possess and not illegal to buy. (Joint App., Solem v. Courter, p. 56) To postulate that it is so dangerous that it can not be sold under any circumstances when alcohol, tobacco, and hand guns can, is to insult the reasonable mind.

Throughout the history of this country, small people, denied basic Constitutional rights by the legislature, for whatever reason, have turned to the courts for relief. Petitioner is well aware that economic substance due process/liberty of contract claims have not been fashionable for a number of years, mainly failing the rational basis test. However, the manner in which this complaint is drawn calls

into question issues which call for strict scrutiny as well. Then too, regulations concerning the commercial milk industry have been uniformly upheld by the courts; but, never have they undergone a direct constitutional challenge with respect to unsolicited, incidental, on-farm sales. As such, this Petition presents a question of first impression.

The State power to enforce regulations for the health and welfare of its citizens is not debatable. But when such regulations become oppressive and cut too deeply into the fabric of individuals' lives, legitimate constitutional questions are brought into focus. The question of whether a state has the right to absolutely prohibit on-farm incidental sales is imperative for the Supreme Court to answer, not only before all the small farms are gone, but before the liberty to go to a small farm and buy food, a freedom taken for granted for many years, is gone too.

CONCLUSION

The petition for the writ of certiorari should be granted.

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